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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 19

THE FIRST NATIONAL BANK IN PLANT CITY, FLORIDA, *Petitioner*

v.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL.

No. 34

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY, *Petitioner*

v.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL.

Reply Brief on Behalf of The First National Bank of Cornelia, Georgia, et al. As Amici Curiae In Support of Petitioners

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A number of erroneous points and arguments made in the briefs of respondents and those amici curiae supporting respondents [1] have already been answered

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[1] These briefs will be referred to as follows: Resp (Fred O. Dickinson, Jr., and the three respondent state banks), NASSB (National Association of Supervisors of State Banks), IBAA (Independent Bankers Association of America, et al.), States (the States of Georgia and North Carolina), and Gainesville (The First National Bank of Gainesville, et al.).

either in the opening briefs supporting petitioners or in the reply briefs filed on behalf of the Comptroller of the Currency and the petitioner bank. This reply brief on behalf of twenty-two amici curiae national banks will attempt to avoid repetition and duplication and will either supplement points referred to by others or deal with points not already covered.

I. It is highly significant that the respondents and their supporting amici curiae cannot agree on whether § 36(f) defines a branch, and that respondents have abandoned the view of the court below that state law rather than federal law is determinative in defining branches.[2] Respondents assert that § 36(f) does define a branch and that the definition is thus one of federal law.[3] The independent bankers, on the other hand, feel that while § 36 includes a definition of branching, it is only a "partial definition" and the ultimate test of

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[2] Respondents attempt to align themselves with the Fifth Circuit by stating that "the true holding of the Court of Appeals is that federal law, and not state law, initially controls the question of what activities of national banks are 'branching' for purposes of the federal branch banking statute • • • " (Resp 41). As shown by the Comptroller of the Currency in his reply brief, this is precisely the opposite of what the Court of Appeals actually ruled.

[3] *E.g.*, "Section 36(f) defines a branch • • • " (Resp 11); "Therefore, First National is branch banking within the express terms of the federal definition of a branch" (*id.* at 12); In the McFadden Act the "term 'branch' was defined as including • • • " (*id.* at 15); The McFadden Act "incorporates the definition of a 'branch' set forth in the 1911 opinion of the Attorney General" *(ibid.)*; "Congress expressly defined a branch • • • " (*id.* at 16); "Further, Congress' use of the word 'include' in section 36(f) indicates its intent to provide a broad definition • • • " *(ibid.)*; "The McFadden Act defined a branch • • • " (*id.* at 19); "Representative McFadden consistently stressed that the definition of a branch contained therein defined branching in terms of 'service' " (*id.* at 20).

the particular activity is whether the state bank is allowed to engage in that activity under state law (IBAA 13). The National Association of State Banks takes the position that § 36(f) is not an all-inclusive definition and that the Congressional intent was to "establish state law as the standard for branching under Section 36(c) of the National Bank Act * * *" (NASSB 11). The Georgia and North Carolina banks take no position in regard to the § 36 definition (Gainesville 5-6), and the States of Georgia and North Carolina feel that branching is involved in this case "regardless of which definition of 'branch banking' the Court applies" (States 5). Surely all of this confusion, at the very least, belies the claim that Congress clearly intended state law to be applied, since the principal parties to the case cannot bring themselves to support this view. And if federal law controls, the District Court and petitioners have amply demonstrated that the activities at issue here come outside the definition.

Further in regard to Congressional intent, respondents rely primarily upon a quotation from Representative Celler to bolster their claim that Congress, while enlarging the powers of national banks to perform off-premises operations, did so only to the extent necessary to permit them to compete equally with state banks (Resp 21). What respondents fail to note is that Representative Celler was definitely expressing a minority view, as demonstrated by the following:

In language immediately following that quoted by respondents, Representative Celler explained an amendment he was offering to the McFadden Act. He said:

> If you are going to do the right thing and are going to put all of these banks on a parity, then if

> the Federal Reserve Board lays down certain rules against State member banks, those same rules should be operative against the national banks when they open their branches. That is the purport of my amendment. * * *
>
> Unless you do that I, who am otherwise in favor of this bill in its entirety, will vote against it, because I feel the bill will be so tinctured with wrong and inequality as to vitiate all the other advantage [sic] of the bill. [67 Cong. Rec. 3241 (1926).]

The House *refused* to adopt his amendment, and he then proceeded to vote *against* the Act (67 Cong. Rec. 3303 (1926)). Congressman Celler, therefore, can hardly be relied upon as the definitive authority on the meaning of the Act he voted against.

II. The state bank supervisors argue that "* * * the source of state law is not supervisor imagination, but the statutes of a state reflecting its branching policy" (NASSB 33). Further, the state bank supervisors urge that "unreasonable construction of those statutes can be struck down," and that it is "unwarranted" to suggest that

> state legislatures or Supervisors may embark on a program to prohibit their own banks from such activities as banking by mail or credit cards (a universal practice throughout the country of both state and national banks) in order to somehow hurt national banks * * *. [NASSB 35-36.]

This position simply will not stand analysis in the light of the facts in Florida and other states. The Florida statute involved here provides only that "the business of the bank or trust company shall be transacted at its banking house * * * and not elsewhere." Fla. Stat., § 659.06(1)(a). Commissioner Dickinson

has interpreted this statute to prohibit a bank from operating a delivery service. Yet just last July, the same Commissioner ruled in a letter to another bank that "the activity of your bank's personnel in selling for cash bank money orders, cashier's checks, travellers' checks, or similar instruments for transmission of money, on board ships docked at Port Everglades, is considered permissible * * *," without even mentioning § 659.06(1)(a).[4] There is no guideline in the Florida statutes for either Commissioner Dickinson's armored car ruling or his shipboard sales ruling, and both quite obviously result from "supervisor imagination."

While it is quite typical for bank regulators to be vested with wide discretion, it is clear that Congress intended national banks to be regulated in such matters as involved here by the United States Comptroller and not by the imagination of fifty different state officers. Indeed, even where branches are concedely involved, Congress quite specifically incorporated into § 36(c) only "the statute law of the State in question," thus indicating that state administrative interpretations were not binding upon national banks.[5] Surely, when Congress has limited so expressly the discretion of state bank supervisors concerning activities agreed

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[4] This ruling was made by Commissioner Dickinson in a letter dated July 28, 1969, to the president of the Broward National Bank, Ft. Lauderdale, Florida, concerning Florida Stat. § 659.52(1)(a), which provides that "no person other than bankers shall: (a) solicit or receive deposits * * *."

[5] *Union Savings Bank of Pachogue* v. *Saxon*, 335 F.2d 718 (D.C. Cir. 1964); *Howell* v. *Citizens First Nat. Bank of Ridgewood*, 385 F.2d 528 (3rd Cir. 1967); *South Dakota* v. *National Bank of South Dakota*, 219 F.Supp. 842 (D.S.D. 1963), *aff'd*, 335 F.2d 444 (8th Cir. 1964), *cert. denied*, 379 U.S. 970 (1965).

to constitute branches, Congress did not intend for supervisor discretion to be used in the first instance in determining whether the branch statutes were to come into play at all. Under the liberal "doing business" test established by the Fifth Circuit, however, "supervisor imagination" can be used to prohibit *any* activity conducted by a national bank outside the four walls of its banking house.

The Court of Appeals employed a gross understatement when it suggested that "national banks may well fear the authority of state comptrollers to make extreme use of this * * * defining process * * *" (App. 407). In Oklahoma, for example, the Banking Board which supervises the state banking commissioner is composed of the commissioner, one citizen having no connection with banking, and three members who "shall be active officers of state banks or trust companies, no one of whom shall be an officer or director of a national bank." 6 Okla. S.A. § 202. This statute is precisely the type of "unfriendly legislation by the States" from which Congress and this Court have consistently immunized national banks. *Tiffany* v. *National Bank of Missouri,* 18 Wall. 409, 413 (1874). We are not casting doubt on the good faith of any Commissioner when we point out that a state regulator attempting to follow the general intent of a legislature such as that in Oklahoma would naturally tend to restrict the competitive ability of national banks.

The justification for our dual system of state chartered and nationally chartered banks is the room for experiment and competition between the two so that new and better services may be developed for the benefit of the public. During the 1920's the state banking system was in such ascendency that the very ex-

istence of the national banking system was threatened, and Congress enacted the branching provisions of the McFadden Act to enlarge the competitive ability of national banks. Now, however, as amply demonstrated by the briefs filed in this case, the national banking system in many states is the more aggressive in finding new and better banking services. The respondents themselves seem to concede this, for they point out that in this very case, "First National obtained a number of new, large commercial accounts as a direct result of its off-premises services (A. 383). It immediately began to handle 'well over' one million dollars a week through the armored car (R. 55-56)" (Resp 39). It is difficult to see how the armored car service could have garnered this much business in so short a time unless there was a substantial demand for it on the part of the banking public.

The state banks, as mirrored by the state bank respondents here, have chosen not to attempt to meet or better these services to the public, but instead to restrict and hold back the national banking system to whatever noncompetitive level the state banks wish it to be.[6] Thus state banking authorities could and would, under the Court of Appeals decision, issue rulings restricting national banks simply because in many states there is no state bank which wishes to offer whatever expanded services are in question. Such an anticompetitive result is fundamentally inconsistent with the concept of a dual banking system; is not supported anywhere in the legislative history of the McFadden

[6] It is not without significance that the independent bankers note: "A state bank supervisor *normally* would not restrict the normal and necessary administrative functions of a state bank away from its main office merely to hamper national banks" (IBAA 17; emphasis added).

Act or any other statute, and flies in the face of this Court's holding that "* * * the Federal Government has frequently expanded their [national banks'] functions and authority * * *" so that "* * * these federal institutions may be at no disadvantage in competition with state-chartered institutions * * *." *Franklin National Bank* v. *New York,* 347 U.S. 373, 375 (1965). The loss of the ability to take the lead in offering new and better service to customers—which is what the state bank supervisors really suggest—would be a severe "disadvantage in competition."

III. Repeatedly, respondents attempt to persuade the Court that the position they espouse would apply *only* where the bank itself is performing the prohibited function. Unfortunately, this is simply not the case.

Take, for example, the Lectro-Teller, an automated off-premises depository. This machine was demonstrated at banking conventions as early as five years ago, but engineering and service problems kept it from taking hold in the industry. Continued research and improvements finally resulted in a field test in Phoenix by the First National Bank of Arizona. The field test resulted in a contract between First National and the Atlas Engineering and Equipment Company for the placing of fifty machines around the state. The bank retained Atlas to lease, place, service and supply the machines, and to pick up and deliver deposits to the bank. By contract and notice, Atlas acted as an agent for the depositor and not for the bank.[7]

Based on First National's success, Lectro-Tellers began to be sold in other states as well. In some in-

[7] See Peck, "The Checkless Society," Bank Equipment News (April 1967).

stances they were operated by the banks themselves; in others, the manufacturer (Milgo Electronic Corporation of Miami) contracted with armored car companies which in turn contracted with the banks. Despite a favorable ruling by the Comptroller of the Currency,[8] the machines began to face rulings of illegality by state authorities, based on the concept that the machines were branches, *regardless* of whether the bank or another party operated the machines.

Thus, in the Oklahoma case referred to in our main brief (p. 13, n. 8), two national banks entered into written contracts with Oklahoma Armored Car, Inc., and a third bank entered into a similar contract with Armored Express, Inc. In each instance, the armored car companies furnished, operated and serviced the machines. The contracts specifically provided that the armored car companies were the agents of the depositors and not of the banks, and that the armored car companies were solely responsible for deposits until delivered to the banks. Despite these facts, the state Attorney General ruled that the machines were absolutely prohibited as branch banking by Okla. Sess. Laws 1965, Ch. 161, § 501, as amended.[9]

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[8] Comptroller's Manual for National Banks, par. 7491.

[9] In a letter to the Commissioner of Banking of Wisconsin, the state Attorney General has ruled that teller machines are branches. Letter from Attorney General La Follette to Commissioner Heironimus dated October 18, 1968. Yet the machines cannot, as a practical matter, qualify as branches under the Wisconsin code. For example, as the Attorney General pointed out, "* * * the teller machine will have to observe the provisions of sec. 220.29, Wis. Stats., pertaining to legal holidays. On the other hand, one of the attributes of the teller machine, as advanced by the manufacturer, is that it will be in service on such days." *Ibid.* The result is to rule them out of existence in that state.

Similarly, on August 22, 1968, the Attorney General of Texas ruled that off-premises deposit machines violated the state's ban on branch banking. In so doing he made a point of the fact that the ban applied even where the machines remained the property of the vending company which produced them and even where the vending company was the agent of the depositor.[10]

Thus, this Court should not be misled into believing that an adoption of respondents' position would apply only where the bank itself is performing the prohibited service. On the contrary, if allowed to ignore the agent-principal contracts between depositors and banks, state authorities will just as easily ignore the agent-principal contracts between service companies and banks. The Oklahoma and Texas rulings show that this is already being done.

The same point illustrated above by Lectro-Tellers is equally applicable to armored car services. While the instant case happens to involve armored cars owned by the bank, the Florida ban could be applied just as easily if the armored cars were operated by Brink's, Wells Fargo, or the innumerable other ar-

---

[10] The Attorney General of Alabama has taken exactly the opposite view. In a letter to Hon. W. M. Monty Collins of the Alabama House of Representatives dated January 29, 1969, Attorney General Gallion wrote as follows:

> This will acknowledge your letter of December 17, 1968, regarding legality of the Lectro-Teller as an off-premises depository, wherein the contract between the bank and Melgo [sic] Electronic Corporation contains a provision that the company is acting as agent for the depositor and not for the bank.
>
> There appears to be no legal impediment to the use of the Lectro-Teller if (1) the operation of these machines is not under the control of the bank, (2) the company is acting as agent for the depositor, and (3) the bank assumes no responsibility whatsoever in connection with said deposits until such deposits have reached the bank.

mored car companies now performing invaluable services throughout the country. The contracts between depositors, armored car companies and banks invariably provide that regardless of who is paying for the service,[11] the armored car companies are agents of the depositors and not of the banks. As evidenced by the Oklahoma and Texas rulings above, however, these contracts are as easily bypassed as those ignored by the Fifth Circuit in the instant case.

The confusion and chaos that would result if independent as well as bank-owned armored car services were brought to a halt staggers the imagination, for these services have become a major factor in banking today.[12] As early as 1958, an Interstate Commerce Commission report showed that about 1,650 armored cars were being operated in the United States; that Brink's Incorporated alone had about 16,000 contracts throughout the United States and Canada, of which about 284 were for interstate movement (commingled with intrastate movements), and that the Armored Carrier Corporation was serving 258 shippers in interstate commerce.[13] Quite obviously, armored car services have greatly expanded in the last eleven years. Even if these services were not entirely eliminated, the impact on interstate movements of widely varying re-

[11] Respondents state that Brink's operates under contracts with bank customers "who pay for the service rendered for them" (Resp 9). This is inaccurate. Often the service is paid for by the bank, not the customer.

[12] The Washington correspondent for Banking Magazine has written that at the time of the *Dickinson* ruling, "11 Florida national banks were considering operating messenger services similar to Plant City's and 4 were actually doing so" (LXI Banking 72 (March 1969)).

[13] Petition of Armored Carrier Corporation, 303 I.C.C. 781, 783, 784 (1958).

quirements and restrictions from state to state would be considerable.[14]

That these services could in fact be eliminated if state authorities were allowed to use their "supervisor imagination" is illustrated by a letter dated April 24, 1969, from Thomas E. Fox, Deputy Attorney General of Tennessee, to M. A. Bryan, state Superintendent of Banks, which is reprinted here in its entirety:

> I have before me your letter of April 24 in which you inquire whether or not an agreement between an Armored Car Services and a local bank for the maintenance of depository for the bank's customers and the transporting of deposits collected therein to the bank would be in violation of § 45-211, Tennessee Code Annotated, which provides, among other things:
>
> "No corporation, firm, or individual shall create and operate any branch bank, office, or agency, for the purpose of receiving deposits, paying checks, making loans, or receiving or discounting bills or notes in any place whatsoever other than the county wherein its principal office is located and its principal banking business is carried on."
>
> You state that the depositor would receive from the machine a deposit slip as agent for the depositor and that such deposit would not be credited to the depositor's account until received by the bank. Further, the depositories would be marked plainly that they are under the exclusive protection and control of the Armored Car Services.

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[14] Respondents seem to concede as much when they say that "Obviously there must be uniformity as to what off-premises activities of national banks constitute a branch for purposes of this section" (Resp 45). Under the Fifth Circuit view, Lectro-Tellers would be branch banking in Illinois but not in Kentucky, and an armored car service would be branch banking in Georgia but not in California (see our opening brief, pp. 7-12, 16).

> You are advised that it appears to me that the Armored Car Services is either operating a bank for itself for the purpose of receiving deposits or operating a branch for the contracting bank and I'm inclined to think it is the latter.

For respondents to allege, in the light of a letter like this one, that state branching statutes are clear on their face,[15] that state authorities would not rule on the basis of "supervisor imagination," and that the only issue in this case relates to a bank's own operations, is simply unrealistic and obviously erroneous. Moreover, the point is not that to date no "instance has been established where a state has treated any off-premises operation other than one involving the receipt of deposits, the cashing of checks, or the making of loans as a branch" (Resp 53; emphasis deleted). The real point, as the District Court recognized in the *Bank of Cornelia* case, is that *any* off-premises operation could be treated as branch banking under some state statutes (see our opening brief, pp. 9-10). In fact, seven specific activities *not* involving the receipt of deposits, the cashing of checks, or the making of loans were cited in that case, and the court agreed that all could be banned under Georgia law (*ibid.*).

IV. By arguing (incorrectly) that the Comptroller's ruling is new and breaks with tradition, respondents

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[15] The vagueness of these state statutes in relation to off-premises activities is illustrated by a letter to the manufacturer of Lectro-Tellers dated February 5, 1968, from the Bank Commissioner of Oklahoma. The letter stated that "there is a national bank in Tulsa that uses an armored car service, whereby various depositors place their deposits in a vault in a shopping center and the deposits are picked up daily and delivered to one certain bank, but there is *quite some question* as to the legality of this action" (emphasis added).

and the independent bankers imply that the ownership and operation of armored cars by banks is itself a new innovation. Quite the contrary is true. "The automobile is not a new element in the banking field, having been used extensively in England, Germany, Canada and the United States, by bankers, trust companies and safe deposit companies, ever since the motor car reached a perfected state."[16] The first use reported in this country was in 1906:

> A traveling bank, which not only receives deposits but carries money to customers to meet their payroll requirements, is part of the equipment of the Night and Day Bank of New York city.
>
> To make the collections the bank has had built a specially designed automobile. Taking up the greater part of the body of the machine is a large safe, built into the automobile so that it cannot be removed. There are no side doors, entrance only being possible to the section containing the safe by a front door next to the chauffeur's seat. The mechanism is so constructed that it is impossible for any one but a chauffeur who has learned the plan to operate it.[17]

In a 1911 advertisement, the Bellamore Armored Car and Equipment Company, which sold this type of armored car to banks, advertised its uses as follows:

> Amongst the many uses of the
> Bellamore Armored Steel Bank Car
> are the following:
>
> The collection of heavy deposits.
> The delivery of pay-roll money to factories.
> The delivery of large sums of money to customers.

---

[16] 81 Bankers' Magazine 739, 741 (1910).

[17] 71 Bankers' Magazine 1017 (1906).

The transportation of bullion.
The carrying of money and securities between branch institutions.
The collection and delivery of valuables for safe deposit.[18]

Thus, we are dealing in this case with a time-honored practice and one that has come into increasing demand as business has flourished and financial transactions have become more complex. From the largest company whose transactions involve millions to the smallest merchant who is fearful of carrying his cash into town, businessmen have come to rely upon armored cars as an integral and essential part of their daily operations. Only if competitive forces are allowed free play between state and national banks can services such as this one be increasingly made available to the banking public.[19]

V. Finally, we press upon the Court that we see no practical alternative to construing § 36 the way here urged by petitioners. Both respondents and the state bank supervisors recognize that banks perform many

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[18] 83 Bankers' Magazine 350b (1911). An armored car built for the First Mortgage Guarantee and Trust Company of Philadelphia was described as follows: "Such a car may be used for the collection of heavy deposits, the delivery of pay-roll money to factories, the delivery of large sums of money to customers, the transportation of bullion, the carrying of money and securities between branch institutions and the collection and delivery of valuables for safe deposit." 83 Bankers' Magazine 808 (1911); see also 83 Bankers' Magazine 732 (1911).

[19] The trend toward new and expanded banking services is exemplified by an advertisement on p. 29 of the September 29, 1969, edition of the Wall Street Journal, in which The Bank of Virginia announces that with its "efficient new jet helicopters, we can provide banks and corporate customers much speedier transportation and communications; much faster availability of funds."

activities at points off premises which are not branches, but no one has suggested any workable distinction between the carrying on of these activities and the establishment of branches other than the distinction adopted by Congress, *i.e.*, the receipt of deposits or the payment of checks [20] or the lending of money.

There is nothing new or different about the agent-principal relationship which forms the basis of petitioners' case. National banks can and do act frequently as agents for their customers in many areas. There is no requirement that the operation of such agencies be confined to the banking house, and indeed some of the agent's duties—such as supervising real estate—would be impossible to perform at the banking house. The only peculiarity about the particular agency involved here is that at a given time and place agreed upon by the parties, the agency terminates and the agent receives the funds involved as his own and becomes the debtor of the principal or customer. Such a practice is not uncommon in banking and has been approved by the courts.[21]

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[20] Respondents' brief frequently confuses "cashing checks" with "paying checks." It is a common practice for many businesses, such as supermarkets, neighborhood bars and dry cleaners to cash checks, without violating the banking laws.

[21] See, *e.g.*, *Marchant* v. *Summers*, 79 F.2d 877 (4th Cir. 1935); *Bernstein* v. *Northwestern National Bank*, 157 Pa. Super. 73, 41 A.2d 440 (1945). As an everyday example, a bank is a mere collection agent for checks given to the bank by its customer for collection and deposit to the customer's account, and these checks do not become deposits until actually collected. *Dakin* v. *Bayly*, 290 U.S. 143 (1933); *Illinois Central R.R. Co.* v. *Rawlings*, 66 F.2d 146 (5th Cir. 1933), *cert. denied*, 291 U.S. 668 (1934); *Pascagoula Nat. Bank* v. *Federal Reserve Bank of Atlanta*, 11 F.2d 866 (5th Cir.), *cert. denied*, 271 U.S. 685 (1926); *In re Framers State Bank of Amherst*, 67 S.D. 51, 289 N.W. 75 (1939).

We believe the distinctions drawn by Congress in § 36(f) are the only workable ones to separate branches from such concedely lawful activities as banking by mail, officer call programs to solicit loans or other business, and the leaving of account cards in an attorney's office so that he may have them executed by his client. This, of all cases, is one in which the practical requirements of an intricate financial world demand only one result. We urge the Court to reverse the Fifth Circuit and hold that (1) federal rather than state law defines branch banking for national banks, and (2) the activities involved here are outside the ambit of the federal definition.

Respectfully submitted,

E. Barrett Prettyman, Jr.
Hogan & Hartson
815 Connecticut Avenue
Washington, D. C. 20006
Attorney for Amici Curiae